

Before the
Federal Communications Commission
Washington, D.C. 20554

CS Docket No. 95-178

In the Matter of

Definition of Markets for Purposes of the
Cable Television Mandatory Television
Broadcast Signal Carriage Rules

NOTICE OF PROPOSED RULE MAKING

Adopted: December 5, 1995; Released: December 8, 1995

By the Commission:

Comment Date: January 19, 1996

Reply Comment Date: February 8, 1996

I. INTRODUCTION AND BACKGROUND

1. In this *Notice of Proposed Rule Making*, we seek comment on a revised market definition process for purposes of the cable television broadcast signal carriage rules.

2. Pursuant to Section 614 of the Communications Act¹ and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,² a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. Section 614(h)(1)(C) of the Act specifies that a station's market shall be determined in the manner provided in Section 73.3555(d)(3)(i) of the Commission's rules, as in effect on May 1, 1991. Section 73.3555(d)(3)(i), now redesignated as Section 73.3555(e)(3)(i), is a separate rule dealing with broadcast station ownership issues that refers to Arbitron "areas of dominant influence."³ An area of dominant influence, or ADI, as defined by the Arbitron audience research organization, is a geographic market designation that defines each television market exclusive of others based on measured viewing patterns. Essentially, each county or portion of a county in the contiguous areas of the United States is allocated to a discrete market based on which home-market stations receive a preponderance of total viewing hours in the county.⁴

3. These market definitions, in addition to defining areas in which television broadcast stations are entitled to insist on cable carriage, through cross-reference and incorporation into the Copyright Act,⁵ also have copyright

consequences. Under the "compulsory copyright licensing" provisions of section 111 of the Copyright Act, different copyright fees are established for local signals than are established for distant signals. Prior to passage of the Satellite Home Viewer Act of 1994,⁶ "local" was defined in terms of the Commission's 1976 mandatory broadcast signal carriage rules. After passage of the Satellite Home Viewer Act amendments, signals were also considered "local" if eligible for mandatory carriage under the carriage rules adopted pursuant to the 1992 Cable Act. More specifically the "local service area of a primary transmitter" was amended to include:

such station's television market as defined in Section 76.55(e) of title 47, Code of Federal Regulations (as in effect on September 18, 1993), or any modification to such television market made, on or after September 18, 1993, pursuant to Section 76.55(e) or 76.59 of title 47 of the Code of Federal Regulations, or in the case of a television broadcast station licensed by an appropriate governmental authority of Canada or Mexico, the area in which it could be entitled to insist upon its signal being retransmitted if it were a television broadcast station subject to such rules, regulations, and authorizations.

4. Section 76.55(e) of the Commission's rules provides that:

(1) a local commercial broadcast television station's market shall be defined as its Area of Dominant Influence (ADI) as determined by Arbitron and published in its Television ADI Market Guide or any successor publication, as noted below, except that for areas outside the contiguous 48 states, the areas of dominant influence may be defined using Nielsen's Designated Market Area, where applicable and that Puerto Rico, the U.S. Virgin Islands, and Guam will each be considered one ADI.

* * * * *

Note: For the 1993 must-carry/retransmission consent election, the ADI assignments specified in the *1991-92 Television ADI Market Guide*, available from the Arbitron Rating Co., 312 Marshall Avenue, Laurel, MD will apply. ADI assignments will be updated at three-year intervals. For the 1996 election period, the 1994-1995 ADI list will be used; the applicable list for the 1999 election will be the 1997-1998 list, etc.

The election referenced in the above rule, which takes place every three years pursuant to the statute, permits local broadcasters to proceed under the mandatory carriage

¹ Section 614 was added to the Communications Act in Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"]. Pub. L. No. 102-385, 106 Stat. 1460 (1992).

² 8 FCC Rcd 2965, 2976-2977 (1993).

³ 47 C.F.R. § 73.3555(e)(3)(i).

⁴ For purposes of this calculation, both over-the-air and cable television viewing are included. Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its

home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, see Arbitron's IT>Description of Methodology.

⁵ 17 U.S.C. §111(f) (Definition of "local service area of a primary transmitter.")

⁶ P.L. 103-369, 108 Stat. 3477 (1994).

rules and insist on carriage in their local market area, or to proceed under the retransmission consent rules permitting broadcasters and cable operators to negotiate cable carriage arrangements. The next election must be made by October 1, 1996.⁷

5. While Arbitron ADIs generally define the area in which a station is entitled to insist on carriage, the Act also directs the Commission to consider individual requests for changes in ADIs. Section 614(h) provides that the Commission may:

with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

II. PROPOSED RULE CHANGE

6. Subsequent to the adoption of the above referenced rules, Arbitron ceased its designation and publication of ADI market areas. Accordingly, the rules need to be amended to establish a new mechanism for defining market areas in which television broadcasters may insist on carriage. Several options appear to be available. First, the Commission could substitute Nielsen "Designated Market Areas" or "DMAs" for Arbitron "Areas of Dominant Influence" or "ADIs." There are differences between DMA and ADI market areas. For instance, Arbitron considers some areas, such as Hagerstown, Maryland or Sarasota, Florida, as separate markets, while under the Nielsen market definition, they are not considered separate. Both listings, however, appear to have been intended to serve roughly the same purposes in the sales of broadcast station advertising time and programming.⁸ The second option would be to continue to use Arbitron's 1991-92 *Television ADI Market Guide* to define market areas, subject to individual review and refinement through the Section 614(h) process. Another option would be to retain the existing market definitions for the 1996 election period and switch to a Nielsen based standard thereafter.

7. It is our tentative view that the second of these options is preferable. It has the advantage of providing stability in the television broadcast signal carriage process. It is also not clear whether changing from ADIs to DMAs and revising market boundaries every three 3-years based on shifting audience patterns, involves any systematic improvement in market definitions.⁹ That is, while one system or the other system may provide a more sophisticated analysis in particular areas, it is not clear whether the changes as a whole are anything other than random statistical variations based upon transitory changes in audience levels. To the extent

that there are substantive and systematic differences in the standards used by Arbitron and Nielsen in defining market areas, it is not clear whether changing from one system to the other would be consistent with Section 614(h)(1)(C). Finally, changing from one system to the other would raise questions as to the numerous cases which have already been processed under Section 614(h) revising market areas with respect to particular stations and particular communities. The same issues would arise with respect to the existing "home county" exception to the standard ADI designation which applies in a limited number of instances where a station primarily serves and has been assigned by Arbitron to a market other than the ADI in which the station's county of license happens to be located.¹⁰ Comment is sought on the above alternatives as well as suggestions for any other alternatives that would better accomplish the market definition objectives of the must-carry provisions of Section 614 of the Communications Act. For example, should the Commission retain the existing market definitions for the 1996 election period, but switch to a Nielsen based standard thereafter? If the existing market definitions are not retained, should the individual *ad hoc* market modification decisions that have been issued pursuant to Section 614(h) of the Act be kept in force notwithstanding any more general changes in market definitions?

III. REGULATORY FLEXIBILITY ANALYSIS

8. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding, because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined in Section 601(3) of the Regulatory Flexibility Act. The change proposed would continue the existing market definitions and the existing market definition change process and would thereby avoid modifications otherwise to be anticipated in a relatively limited number of markets in which there are not likely to be a significant number of small business entities impacted. The Secretary shall cause a copy of this *Notice of Proposed Rule Making*, including the certification, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

IV. INITIAL PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

9. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995 and imposes no new or modified information collection require-

which stations obtain the preponderance of the audience in a county includes both off-air and cable audience, the market definition process is somewhat circular. That is, cable carriage influences market allocations which determines cable carriage. Over time this measurement process could tend to expand the size of the larger markets with more numerous and stronger stations.

¹⁰ See 8 FCC Rcd at 2975; 47 C.F.R. §76.55(e)(3).

⁷ 47 C.F.R. § 76.64(f)(2).

⁸ Anchorage and Fairbanks, Alaska markets are defined in the rules in terms of DMAs. Arbitron did not define ADIs for Alaska markets. If, as discussed below, market definitions are fixed as they are currently, subject only to the Section 614(h) modification process, it would seem logical to also retain the existing Alaska markets in the same fashion. If the existing market definitions were retained, a new station, in the absence of specific petitions seeking a different result, would simply be treated as assigned to the market in which its community of license was physically located.

⁹ Because the audience measurement data that determines

ments on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

V. PROCEDURAL PROVISIONS

10. *Ex parte Rules - Non-Restricted Proceeding.* This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. See generally, 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

11. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before **January 19, 1996** and reply comments on or before **February 8, 1996**. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you would like each Commissioner to receive a personal copy of your comments and reply comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street N.W., Washington D.C. 20554. Comments are due by January 19, 1996 and reply comments are due by February 8, 1996.

VI. ORDERING CLAUSES

12. ACCORDINGLY, IT IS ORDERED that, pursuant to Sections 4(i), 4(j) and 614 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 534, NOTICE IS HEREBY GIVEN of proposed amendments to Part 76, in accordance with the proposals, discussions, and statement of issues in this Notice of Proposed Rulemaking, and that COMMENT IS SOUGHT regarding such proposals, discussion, and statement of issues.

13. IT IS FURTHER ORDERED that, the Secretary shall send a copy of this Report and Order, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 *et seq.* (1981).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

It is proposed to amend 47 C.F.R. §76.55(e) to read as follows:

§76.55 Definitions applicable to the must-carry rules

For purposes of the must-carry rules set forth in this subpart, the following definitions apply:

* * * * *

(e) Television market.

- (1) a commercial broadcast television station's market, unless amended pursuant to Section 76.59, shall be defined as its Area of Dominant Influence (ADI) as determined by Arbitron and published in the Arbitron 1991-92 *Television ADI Market Guide*, except that for areas outside the contiguous 48 states, the market of a station shall be defined using Nielsen's Designated Market Area (DMA), where applicable as published in the Nielsen 1991-92 *DMA Market and Demographic Rank Report*, and that Puerto Rico, the U.S. Virgin Islands, and Guam will each be considered a single market.
- (2) A cable system's television market(s) shall be the one or more ADIs in which the communities it serves are located;
- (3) In addition, the county in which a station's community of license is located will be considered within its market.